where the delay was caused by government priority orders placed under the National Defence Act, U. S. Comp. St. 1916, secs. 3115f-3115h, and the Navy Appropriation Act 1917, ch. 180. *Moore & Tierney v. Roxford Knitting Co.* (1918, N. D. N. Y.) 250 Fed. 278; *Mawhinney v. Millbrock Woolen Mills* (1918, Sup. Ct.) 105 Misc. 99, 172 N. Y. Supp. 461; see COMMENTS (1919) 28 YALE LAW JOURNAL, 399. Even in the absence of such contractual provision no action would lie for damages so caused. *Lipton v. Ford* [1917] 2 K. B. 647. But a manufacturer who for some legitimate reason has not performed on time cannot charge the purchaser as for a performance. Excuse is not a performance. The court in the principal case based its decision on the ground that time was of the essence of the contract. It has been held that performance by the date set in the contract was important only as a condition precedent to the purchaser's duty to pay for the goods, if delivered. *Rosenthal v. Empire Brick and Supply Co.* (1907, Sup. Ct.) 54 Misc. 633, 104 N. Y. Supp. 769. Where the impossibility was only temporary, the obligation has been held not to be discharged but, at most, suspended. *Vorhaus v. City National Securities Co.* (1917, Sup. Ct.) 167 N. Y. Supp. 736; *Tamplin S. S. Co. v. Anglo Mexican Co.* [1916, H. L.] 2 A. C. 397. Whether a manufacturer whose performance had been temporarily excused, could, after revival of his obligation, compel a buyer who had not objected to the delay to accept delivery, is not decided in the instant case, because upon default of the plaintiff the buyer had given notice of his election to rescind. Here the plaintiff's delay was not a breach of its duty, for its promise was expressly limited by the clause concerning unavoidable delay. Its delay was a nonfulfillment of a condition precedent to any right against the buyer, because time was of the essence of the contract. The decision seems sound and protects a purchaser to whom, notwithstanding the manufacturer's justification for delay, performance on time is essential. The seller was privileged not to pay damages for delay; the buyer was privileged not to take and pay for the articles.

DAMAGES—LIQUIDATED DAMAGES AND PENALTY—CONTRACT FOR EXCHANGE OF LAND.—The plaintiff and defendant entered into an agreement for the exchange of land. The contract contained a covenant by which the plaintiff agreed to turn over farm produce, valued at $280, to the defendant. The defendant refused to carry out the agreement and the plaintiff brought this action for breach of contract. At the trial the plaintiff offered no evidence of damage, but relied on a clause of the contract which provided that if either party should fail to perform "all of the agreements herein contained, the said party shall forfeit the sum of $500 as liquidated damages." *Held,* that the plaintiff should not recover, as the sum stipulated was a penalty. *Ayers v. Houston* (1920, App. Div.) 183 N. Y. Supp. 808.

Probably the real test as to whether an amount stipulated in a contract for the exchange of land is a penalty or liquidated damages, regardless of the language used or the particular basis on which the courts claim to arrive at their decisions, is whether the amount is reasonable or not. *Morse v. Rathburn* (1868) 42 Mo. 594; *Scofield v. Tompkins* (1880) 95 Ill. 190. There seems to be considerable confusion, however, as to how the test of reasonableness should be applied. Some courts compare the sum stipulated with the actual damage sustained. See *Blunt v. Egeland* (1908) 104 Minn. 351, 354, 116 N. W. 653, 654; *Holland Torpedo Boat Co. v. Nixon* (1908, Sup. Ct.) 61 Misc. Rep. 469, 115 N. Y. Supp. 573. So if no injury results it will be regarded as a penalty. *Dunn v. Morgenthau* (1903) 73 App. Div. 147, 76 N. Y. Supp. 827, affirmed in 175 N. Y. 518, 67 N. E. 1081. On the other hand, most courts adopt what seems to be a sounder view, that the comparison should be made between the amount stipulated and the damages which might reasonably have been expected

to follow on a breach. *Rabinowitz v. Apter* (1915) 90 Conn. 1, 96 Atl. 157; *Webster v. Bosanquet* [1912, P. C.] A. C. 394; *Ellicott Machine Co. v. United States* (1907) 43 Ct. Cl. 232. It is possible that if the court had applied the latter doctrine the decision might have been different. It can better be sustained on the ground that the agreement contained one covenant, among others, the breach of which could not possibly have resulted in damages as great as the amount stipulated. *Johnson v. Dittes* (1917) 137 Minn. 175, 162 N. W. 1078; *Boalware v. Crohn* (1907) 122 Mo. App. 571, 99 S. W. 796; *contra, Madler v. Silverstone* (1909) 55 Wash. 159, 104 Pac. 165.

EVIDENCE—EXTRAJUDICIAL ADMISSIONS—SILENCE AFTER AN ACCUSATION—EFFECT OF COUNSEL'S ADVICE.—The defendant and two others were arrested and taken into custody charged with attempted robbery. One of the participants made a confession implicating the defendant. The latter refused to make any statement, assigning as his reason the advice of counsel. The lower court over objection admitted the accusation and the conduct of the accused, although it did not then have before it the testimony as to the genuineness of the defendant's excuse. *Held,* that the evidence was properly admitted. *People v. Graney* (1920, Calif. App.) 192 Pac. 460.

If a person charged with crime remains silent when accused of guilt, where the circumstances are such as would naturally call for a denial, the accusation and his conduct may be introduced in evidence for the jury to determine whether his silence is to be regarded as an admission of the truth of the accusation. *Kelley v. People* (1874) 55 N. Y. 565; *People v. Jordan* (1920) 292 Ill. 514, 127 N. E. 117; 2 Wigmore, *Evidence* (1904) sec. 1071. The accusation, without proof of the silence of the accused, is never admissible for the truth of the facts contained in it. Silence, however, is not always equivalent to admission; it is often explicable as ignorance or dissent and without the background of the particular occasion has no significance. It is, then, the function of the court to determine as a preliminary question whether the accusation under the circumstances called for a reply or whether the accused was in a position where he could, or the ordinary man would, reply. *Weightnovel v. State* (1903) 46 Fla. 1, 35 So. 856; *People v. Byrne* (1911) 160 Calif. 217, 116 Pac. 521. Where the testimony as to the surrounding circumstances is conflicting, theoretically the question should be determined by the trial court, but it is the practice of some courts to leave the question to the jury under proper instructions. *State v. Guffey* (1917) 39 S. D. 84, 163 N. W. 679; *State v. Christ* (1920, Iowa) 177 N. W. 54. The courts are in conflict as to when silence is justifiable. Some hold that the mere fact of arrest is sufficient to excuse a failure to answer. *Bouldin v. State* (1920, Tex. Cr. App.) 222 S. W. 555; *Ellis v. State* (1913) 8 Okla. Cr. App. 522, 128 Pac. 1095. The sounder view would seem to be that of the instant case, that arrest is not a ground for exclusion unless it is shown that the accused was not free to speak. *People v. Swaile* (1909) 12 Calif. App. 192, 107 Pac. 134; *State v. Booker* (1910) 68 W. Va. 8, 69 S. E. 295. The party offering the evidence must of course prove affirmatively that the accused heard the statement. *Commonwealth v. Brown* (1919) 264 Pa. 85, 107 Atl. 676. The advice of counsel would also seem to be a proper reason for silence and a tenable ground for exclusion of the evidence, and it has been so held in a recent case similar on its facts to the instant case. *People v. Conrow* (1911) 200 N. Y. 356, 93 N. E. 943.

INSURANCE—MUTUAL BENEFIT SOCIETIES—BY-LAW ABOLISHING PRESUMPTION OF DEATH.—The defendant's contract of insurance expressly reserved the right to bind members by subsequently enacted by-laws. After issuance of the certificate in suit, but before the insured's disappearance, the society enacted a by-law to the effect that absence without communication should never entitle a